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No. 86-918

In The
Supreme Court of the United States
October Term, 1986

CITY AND COUNTY OF SAN FRANCISCO, etc., *et al.*,

Petitioners,

vs.

CHRISTIAN SCIENCE READING ROOM JOINTLY MAINTAINED, etc. *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in analyzing this matter as an equal protection question rather than a question of first amendment access to a "non-public forum" where respondents' complaint was not that they had been denied access to the public areas of the Airport in order to exercise free speech rights, but rather that the Christian Science Reading Room, alone of all the tenants in the South Terminal of the San Francisco International Airport, had been selectively denied the right to continue to rent commercial space on an arms-length basis as a result of petitioners' determination that it was conducting "religious activities" on the premises?

2. Did the Court of Appeals err in refusing to permit petitioners to justify their conduct under the rational basis equal protection test by fictional post-hoc rationales, where the unchallenged findings of the trial court established both the actual basis for petitioners' actions and the fact that the post-hoc rationales proffered by counsel were not relied on?

LIST OF ALL PARTIES

Petitioner City and County of San Francisco is a municipal corporation. Petitioner Airports Commission of the City and County of San Francisco is the agency designated by the San Francisco City Charter to manage the San Francisco International Airport. Petitioner Louis A. Turpen is the Director of Airports of the City and County of San Francisco. Morris Bernstein, J. Edward Fleishell, Ruth E. Kadish, Z. L. Goosby, and William K. Coblentz are members of the Airports Commission.

Respondent Christian Science Reading Room Jointly Maintained is a California non-profit religious corporation. Respondent David M. Sacks is an adherent of the Christian Science faith, who has in the past availed himself of the services of the Reading Room facility at the San Francisco International Airport, and who intends to do so in the future.

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CONSTITUTIONAL PROVISIONS

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COUNTER-STATEMENT OF THE CASE

As set forth in petitioners' Petition for Writ of Certiorari ("Petition"), this case concerns the constitutionality of the decision of petitioner Airports Commission of the City and County of San Francisco ("Commission") to discontinue renting commercial space in the San Francisco International Airport to respondent, Christian Science Reading Room Jointly Maintained ("Reading Room").

Contrary to the statement set forth in the Petition, however, this case does not concern any assertion on behalf of respondents that they are "guaranteed the right, under the First Amendment's Free Speech and Free Exercise of Religion clauses, to rent commercial space . . ." In fact, what this case has always been about is whether petitioners may select the Reading Room, which since 1957 has been an arms-length, non-preferred, rent-paying tenant of the Airport, for discriminatory eviction based upon petitioners' unfounded and incorrect concern that continuing to rent space to the Reading Room would somehow violate either the establishment clause of the United States Constitution (the United States Constitution, 14th Amendment, § 1) or the "preference" clause of the California Constitution (California Constitution, Article I, § 4). The Reading Room has never sought a "guarantee of access;" it has sought merely to be treated like any other similarly situated tenant of the San Francisco International Airport.

The facts underlying this dispute are fully set forth in the Order Granting Permanent Injunction entered by the Honorable Samuel J. Conti of the United States District Court for the Northern District of California. That Order contains 32 specific findings of fact which are set

forth at Appendix E of the Petition. Those factual findings, which are unchallenged by petitioners, establish that the Reading Room has occupied rental space at the Airport for nearly thirty years, paying rent for the premises occupied at a rate determined by the Commission, and never receiving any preference, in either the amount of rent or other terms of tenancy, over similarly situated Airport tenants. Indeed, the Reading Room's rental was at all times determined by the Commission pursuant to the Commission's standard rental rate schedule. (Finding No. 8.)

On March 21, 1984, the Commission served an eviction notice on the Reading Room requiring it to vacate the premises by April 21, 1984. The letter assigned, as the reason for the action, the Commission's determination that it would no longer issue leases or permits for any "religious activity" at the airport. (Findings of Fact 17 and 18.) Thereafter, on April 17, 1984, the Commission promulgated a new policy declaring that it would not "provide space at San Francisco International Airport for conduct of religious activities, except as specified by Rules and Regulations relating to first amendment activities." (Finding No. 19.) This policy, and the decision to evict the Reading Room, was based *solely* on the Commission's concern that permitting the Reading Room to continue its tenancy would violate the establishment clause of the first amendment of the United States Constitution. (Finding No. 24.)

The Commission's action against the Reading Room came in connection with a general relocation of tenants during the course of airport renovation. All or virtually all tenants similarly situated to the Reading Room, were offered relocation in connection with the renovation pro-

cess. The Reading Room alone was evicted. (Finding No. 21.) The trial court specifically found that petitioners' actions were not motivated by any of the post-hoc rationales suggested by petitioners' counsel. The Reading Room was not evicted due to lack of space, in order to maximize rental income to the airport, on the basis of any "passenger survey," or because the Reading Room had a "permit" and not a "lease." (Findings No. 28-31.)

In the wake of the Commission's action, the Reading Room filed this lawsuit. On May 8, 1984, the District Court issued a permanent injunction and entered judgment for respondents, holding that petitioners' actions had violated Respondents' right to free exercise of religion and equal protection. Following petitioners' appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court on equal protection grounds. Petitioners' petition for rehearing en banc was denied and the instant petition followed.

REASONS FOR DENIAL OF THE WRIT

I. The Unchallenged Findings of Fact Compel the Result Below.

The findings of fact entered by the District Court—findings unchallenged by petitioners—not only compelled the disposition entered below, but rendered that disposition fairly unextraordinary. The District Court found that the Reading Room, alone, was singled out for eviction rather than relocation. The District Court further found that the decision to single out the Reading Room was premised entirely upon petitioners' incorrect assumption that continuing to treat the Reading Room like its other tenants

would result in a violation of either the establishment clause of the United States Constitution, the preference clause of the California Constitution or both. The District Court held, and the Ninth Circuit affirmed, that the rental of airport commercial space on an arms-length basis to the Reading Room violated neither the federal nor California constitution. In their petition to this Court, petitioners apparently concede the correctness of the Ninth Circuit's establishment clause analysis; they do not present it as a question for this Court.

On the unchallenged facts found below, the conclusion that petitioners' actions violated the equal protection clause, regardless of which equal protection test is used, is neither novel nor noteworthy, and it certainly does not merit the attention of this Court. The question of whether the Ninth Circuit properly applied the rational basis test will be discussed below.

II. Petitioners' "Public Forum" Argument Cannot Obscure The Fact That This Matter Has Been Properly Decided On Equal Protection Grounds.

Petitioners have now offered this Court the same red herring offered to and rejected by the Ninth Circuit and the District Court; their "public forum" argument. Petitioners again argue that the airport, as a "limited public forum" or a "non-public forum," may make "reasonable" distinctions between tenants seeking to rent commercial space, so long as such distinctions are not based upon "viewpoint discrimination."

But petitioners cannot avoid their equal protection problems by trying to squeeze this case into the "public forum" category. Petitioners have no objection to the

Reading Room's message. Indeed, counsel for petitioners have repeated throughout this case that petitioners would be happy to issue the Reading Room a permit, as it does for other non-profit groups, both religious and secular, to share rent-free space on a rotating basis for the exercise of first amendment rights. Respondents' complaint is not that petitioners have denied them access to the Airport, but rather that petitioners have sought to prohibit the Reading Room from continuing to rent space on a commercial, arms-length basis as the Reading Room's similarly situated co-tenants do. Thus, the question is not access, but, rather, whether the Reading Room may be singled out for disparate treatment based upon what petitioners perceive is its character as a religious facility.

This is not a public forum case. It is an equal protection case and was properly decided as such by the Ninth Circuit.

III. The Court of Appeals For The Ninth Circuit Properly Applied The Rational Basis Standard Of Review.

Petitioners' final argument betrays a basic misunderstanding of equal protection law. Petitioners suggest that in every case, where a hypothetical post-hoc governmental purpose can be imagined which is rationally related to the action taken, even where it is demonstrated that the *real* governmental purpose had nothing to do with the hypothetical rationales, the action passes muster under the rational basis test.

Petitioners purport to rely principally on *Fleming v. Nestor*, 363 U.S. 603 (1960) and *Vance v. Bradley*, 440 U.S. 93 (1979), for the proposition that, in the application of the

rational basis equal protection standard, courts are bound to accept any hypothetical governmental purpose government counsel might offer. That is not the law. It is true that this Court has held that where "there are plausible reasons for [the government's] action," the Court's inquiry is at an end; and that whether the proffered reasoning in fact underlay the governmental action is "constitutionally irrelevant." *See United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 179 (1980). Neither in *Fritz,* nor in any case that counsel are aware of, however, did the Court hold that post-hoc rationales are to be accepted where the record compels the conclusion that the proffered rationales could *not* have underlay the governmental action. Indeed, in *Weinberger v. Weisenfeld,* 420 U.S. 636, 648 n.16 (1975), this Court counseled against consideration of a hypothetical purpose where it is clear that "the asserted purpose could not have been a goal of the [policy]." *See also Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463 n.7 (1981).

As the Ninth Circuit recognized in its opinion below, the uncontested factual findings in this case absolutely preclude the possibility that any of the hypothetical purposes proffered by counsel for petitioners had anything to do with the *actual* purpose of the eviction of the Reading Room. That court's decision, therefore, was completely in line with established equal protection doctrine.

This case does not raise the question of the amount of deference to be accorded the legislature where it is *possible* that a legitimate governmental purpose was rationally related to the discriminatory action in question. Here, there is no such possibility. As petitioners' rental arrangement

with the Reading Room was in full compliance with the applicable provisions of both federal and state constitutions, neither petitioners' "anti-religious activities" policy nor their eviction of the Reading Room was rationally related to the avowed purpose of complying with those constitutions.

———o———

CONCLUSION

This matter is not worthy of the Court's attention. Petitioners, without any responsible consideration or study of the issues, casually concluded that the continued tenancy of the Reading Room at the airport might somehow violate the state or federal constitution, and on the basis of that conclusion—and on no other basis—determined to terminate that tenancy. Petitioners' suggestion that the Ninth Circuit's decision "will launch federal courts upon an improper and dangerous course of inquiry into the actions of their coequal branches of government," is without merit. If the rational basis standard means anything, courts must examine the relationship between a known and acknowledged governmental purpose and the challenged classification purportedly intended to advance that purpose.

No one in this case has asked any court to speculate on petitioners' motives. They are known. Should it ever be held that the courts are bound to accept post-hoc hypothetical rationalizations for a challenged classification, even where the actual governmental purposes are known and not rationally related to that classification, then the courts would indeed be on "an improper and dangerous course."

The Court of Appeals for the Ninth Circuit properly considered and decided this case on the basis of established equal protection law. Respondents therefore respectfully urge the Court to deny the petition for certiorari.

Respectfully submitted,

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